Productivity Commission Inquiry
Access to Justice Arrangements – Submission on behalf of Allens

Allens is grateful for this opportunity to comment in response to the Productivity Commission's issues paper dated September 2013. We provide below submissions in response to those questions raised in the issues paper to which the firm's experience is directly relevant.

Topic 2 – Avenues for dispute resolution and the importance of access to justice

How does a failure to provide adequate access to justice impact on individuals and the community more broadly?

When individuals do not have ready access to the justice system, whether because they cannot gain access to affordable representation and/or because they do not have adequate and accessible information about the legal avenues available to them, they cannot resolve their legal problems. This can result in legal problems of escalating complexity and seriousness and can require more time and resources to be expended by both the justice system and other government funded sectors.

At Allens, we have an extensive pro bono legal practice, providing over 40,000 hours a year of free legal services to individuals and not for profit organisations. A significant area of this practice involves the provision of legal advice and representation to homeless people. Through our homeless legal clinics, we see hundreds of clients a year who have legal problems and few if any ways to address those problems themselves or with government funded legal services. Often, our clients' problems have been exacerbated by delay in addressing them. Examination reveals that the delay is due to their lack of access to the legal system, including inability to fund private representation and inability to gain access to legal aid or community legal centre help either because these services have guidelines that exclude them, or because these services are not understood by them, or otherwise hard or impossible to use.

We see many examples of clients whose problems are made worse by difficulty accessing justice. Examples include clients with numbers of infringements, for example, for travelling on public transport without tickets because they cannot afford tickets. When these clients can demonstrate special circumstances, such as mental illness or homelessness, they are often eligible for relief from these infringements but the complex, time consuming and technical process involved in establishing their special circumstances means they may never seek to advance these arguments or will do so only after long delays, during which the amount of their infringements will increase because of added fees and penalties and the seriousness of the infringements will escalate, causing extra distress to the client, and increased time and cost both to administer the infringements and to resolve the matter legally. Stress is not just a problem for the mental health of the individual involved but will frequently result in or exacerbate mental illness, jeopardise employment, lead to substance abuse, damage relationships and so on. All of these stressors increase the health burden of the individual, negatively impact on social inclusion and ultimately cost society both in dollar terms and in quality of life.

Topic 3 – Exploring legal needs

What are the social and economic impacts arising from problems that are either unresolved or escalate due to lack of access to legal assistance?

Through our pro bono practice, we frequently deal with instances of critical delay that affect the rights and circumstances of our clients. This arises in relation to our various homeless clinics, as well as with asylum seeker clients and in various other contexts. Often these delays lead to more serious legal problems, including in the circumstances of infringements as described in the answer to topic 2 above and with clients experiencing housing problems. We often represent clients living in government housing or in private tenancies who encounter difficulties arranging critical repairs to their properties as well as clients who face eviction from their housing. There are legal mechanisms to enable tenants to compel landlords

to undertake reasonable repairs within reasonable timelines but these mechanisms require various formalities to be met, including documentation of requests, forms completed, applications filed and so on. For tenants with low literacy, low competence with or access to technology (inducing to gain access to forms and other information), often multiple complex social problems, perhaps including mental illness, navigating these sorts of processes is often impossible. When repairs are not made, there are often negative health consequences, including for example from living in damp or dirt, dealing with inadequately secure housing, or living with inadequate heat or lighting. Notices to vacate with enough time, may be susceptible to challenge or negotiated resolution but when ignored or not understood, because adequate legal advice is not available, will often become enforceable and sometimes, with very short timeframes. When people living with little or no safety net lose their housing, the social consequences are grave.

Topic 4 – The costs of accessing civil justice

How important is face-to-face contact with lawyers or court officers? Does a lack of physical proximity represent a barrier to accessing justice? To what extent can technology overcome physical barriers?

Research shows that technology can be appropriate to facilitate contact between clients and legal advisers where the nature of the work is relatively simple and the client does not face barriers to communication by technology. For more complex matters and where clients face obstacles to communication such as literacy problems, English limitations, mental health problems or other disability, face to face contact is always preferable.[1]

Which particular regions, groups or case types face geographic constraints to accessing the justice system?

A priority focus for our pro bono practice is work with Aboriginal and Torres Strait Islander clients and informed by that work we make the following comment:

Remote Aboriginal and Torres Strait Islander communities often have no or very little access to legal representation and to the legal system. There are communities, particularly in parts of Western Australia, Queensland and the Northern Territory with no community legal centres, little if any legal aid presence and no or very little Aboriginal and Torres Strait Islander Legal Service presence. Theoretical access to services located in cities or regional towns is of little if any practical value to clients who have little or no access to the internet and consistent phone service. Face to face contact is often required to establish a relationship and obtain adequate instructions. Attempting to establish a relationship and then obtain instructions without at least initial face to face interaction is often impossible and at best, time consuming, inconsistent and often unsatisfactory both for the client and the lawyer. For many Aboriginal and Torres Strait Islander communities living outside major centres, English is often a second, third or even fourth language and any language barrier exacerbates the challenges of communicating other than in person. Aboriginal and Torres Strait Islander people have high levels of hearing impairment and this too, makes direct communication important. Deeply entrenched suspicion of government and the justice system, developed over hundreds of years of dispossession and discrimination makes interactions with government and the legal system extremely stressful and highly resisted by many Aboriginal and Torres Strait Islander people. Overcoming this resistance in order to assist people to engage with the system as appropriate to protect their interests requires culturally appropriate services, critically including direct personal contact with trusted individuals over long periods of time. Technology cannot be an effective substitute in these circumstances.

[1] Roger Smith, *Can digital replace personal in the delivery of legal aid?* (14 June 2013) Discussion paper submitted to the ILAG Conference <http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/The_Hague_2013/Session_Papers/5.1_-_Roger_Smith.pdf>; Jessica Pearson and Lanae Davis, *The Hotline Outcomes Assessment Study Final Report - Phase III: Full-Scale Telephone Survey* (2002) Center for Policy Research <http://www.nlada.org/DMS/Documents/1037903536.22>.

Topic 8 – Effective matching of disputes and processes

How might people with complex legal needs be better directed to multiple legal and non-legal services to meet their needs? How can services be 'joined-up' to assist in this regard?

There are two good models for joined-up legal service of which we are aware. The Melbourne Homeless Persons Legal Clinic run by Justice Connect employs a social worker as well as lawyers. The social worker is available to provide advice about social services to the employed and pro bono lawyers who conduct the clinic's legal work and also available to consult directly and manage ongoing social service case work for the clinic's clients. This service greatly improves the capacity and quality of the legal service provided by the clinic because it enable lawyers to identify non legal remedies for clients and to navigate complex bureaucratic government sector support systems to deliver advice and service to the clients. It is often impossible to obtain effective legal remedies for clients in isolation from their complex and ongoing social problems so being able to address both sets of usually overlapping and interrelated needs simultaneously leads to far better outcomes.

Another model under discussion in Australia is the integration of medical services with legal services along the lines of medical legal partnerships common in the United States. This model requires more than co-location of services. It is a model of integrated service provision, where staff of both sides of the practice – medical and legal – communicate closely and collaborate to service client need. While even those with legal problems will not always seek legal services, most people in the community do interact with medical practitioners at some stage. This model involves the provision of education to doctors and support staff at medical practices regarding the types of legal problems that may affect people's health and that often co-exist with health conditions, particularly poverty related health problems. It trains both sets of practitioners to cross refer and work collaboratively to deliver effective solutions.

Topic 11 – Improving the accessibility of courts

The conduct of parties in civil disputes and vexatious litigants

The Commission has raised the issue of the effectiveness of model litigant rules and legislative provisions concerning the conduct of litigation. That issue is addressed below in connection with the Commission's comments about court processes and imbalances in resources.

Court processes

In the opening paragraphs of the section entitled court processes, the Commission has raised two discrete issues: concerns about procedure and concerns about their exploitation by well-resourced parties. We address each in turn.

Procedures

Court procedures relating to Discovery and Witnesses and experts are addressed in more detail below. One aspect of procedure that is not mentioned expressly in this section of the issues paper is pleadings.

Pleadings are often criticised for being a source of undue cost and delay. For example, in the Victorian Law Reform Commission's (***the VLRC***) report entitled *Civil Justice Review Report 14,*[2] the VLRC noted that it receives complaints about the significant resources devoted to interlocutory disputes about pleadings, the significant costs associated with such disputes and the fact that they are inefficient and not conducive to bringing about the early resolution of disputes.[3] Similar criticisms have been made at a

[2] Victorian Law Reform Commission, *Civil Justice Review Report 14* (28 May 2008) <http://www.lawreform.vic.gov.au/projects/civil-justice/civil-justice-review-report>.

[3] Victorian Law Reform Commission, *Civil Justice Review Report 14* (28 May 2008) <http://www.lawreform.vic.gov.au/projects/civil-justice/civil-justice-review-report>, 715.

judicial level. For example, in *Barclay Mowlem Construction Ltd v Dampier Port Authority*[4] the defendant filed a list of objections to the statement of claim running to 40 pages. The plaintiff sought orders as to how to resolve the dispute surrounding the adequacy of the pleadings. Martin CJ stated that:

> provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and appraising the parties of the case that has to be met, the court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.
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> …
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> In my view many of the objections which have been taken are pedantic and pettifogging in nature. In many cases, elucidating and resolving the objection would consume an amount of time and resources, which is entirely disproportionate to the benefit to be derived from that process in terms of the identification of the true issues which have to be met in the case.[5]

Amidst these criticisms, it is important to note the Chief Justice's reference to effort 'disproportionate' to benefit. In smaller disputes, an interlocutory hearing related to pleadings may take nearly as much time as the final hearing without producing commensurate efficiencies. However, a different approach may be needed for larger matters. It is important not to overlook the capacity of properly drafted pleadings to narrow the issues in dispute and reduce the duration and cost of litigation as a result. For large matters, a short interlocutory hearing about pleadings at the outset of the litigation may significantly reduce the scope of discovery, the volume of evidence and the length of the final hearing. In our submission, the Commission should not discount the potential for a disciplined approach to pleadings, supported by courts willing to enforce the rules, to reduce the cost of large scale litigation.

Exploitation of processes

How are imbalances in the resources available to disputing parties best addressed so that outcomes are not based on one party being able to effectively exhaust the resources of another, rather than winning on merit? Should model litigant obligations be extended to circumstances where a private party is significantly better resourced than the other in proceedings?

The framing of this issue implicitly assumes that having more resources is always or at least typically an advantage in litigation. That assumption ought to be tested. Upon reflection, it is not a complete or satisfactory description of the role that resources may play in litigation. In any event, we consider that existing regulation is sufficient to address resource imbalances.

Parties with access to more resources may suffer from some disadvantages that offset the benefit of having those resources. For example:

- their exposure to an adverse costs order is always a real, not merely theoretical threat;
- they are often more vulnerable (in the sense of being sensitive) to adverse publicity (including publicity about their conduct of litigation);
- they may be subject to extra-judicial systems of accountability, such as shareholder comment at an annual general meeting;
- litigation is often an unwelcome distraction from other business activities. The time of key employees may be diverted towards running the case. Prospective customers might be deterred from doing business with an entity that has litigation hanging over it; and

[4] (2006) 33 WAR 82; [2006] WASC 281.

[5] Ibid, 84.

- case-management decisions can have more unwelcome effects on them. For example, the burden and cost of discovery typically falls on the party with more resources.

The relevance of such considerations is not that they obviate the need for the conduct of litigation to be policed. The point, rather, is that they mitigate against the introduction of rules that discriminate against a party to litigation because of some perceived latent advantage. The existing rules impose sufficient constraints without resorting to a bias one way or the other.

Legislation governing conduct in many Australian courts already contains a statutory command that litigation be conducted as efficiently as possible. For example, s56(1) of the *Civil Procedure Act 2005* (NSW) (***CPA***) states that 'the overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings'. Section 56(3) places a party to civil proceedings 'under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court'. There is a similar regime in Chapter 2 of the *Civil Procedure Act 2010* (Vic). Section 37M of the *Federal Court Act 1976* (Cth) provides that the overarching purpose of the civil litigation provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

This legislation both informs and complements the broader duty of legal practitioners not to increase the duration and cost of proceedings unduly.[6] As Dal Pont explains, acts or omissions by a lawyer that add unnecessary time and cost to the litigation are an abuse of court process because they are not directed at the main aim of the proceedings, namely a judicial or negotiated resolution of the dispute.[7] In addition, there are extensive professional conduct rules imposed on lawyers which require them not to act unless there are reasonable prospects of success and so forth. The model litigant obligations assumed by government litigants do not impose a higher burden on them in the conduct of litigation.

It is submitted that this regime is a more appropriate way to ensure that litigation is conducted with a view to merits rather than resources deciding the outcome. The principles that must be applied are clear and they apply equally to both sides of a dispute. There are sanctions for violating them. For example, s99 of the *CPA* empowers the court to make costs orders against legal practitioners where the court finds that costs have been incurred by the serious neglect, incompetence or misconduct of a lawyer, or they were incurred improperly or without care in circumstances for which the lawyer is responsible. In addition, the court has the power to make an award of indemnity costs in circumstances of abuse of process or unreasonable conduct, amongst others.[8]

Discovery

As the Commission has noted in its issues paper, discovery 'is often the single largest cost in any corporate litigation'.[9] This statement is consistent with our experience. The costs and administrative burden associated with discovery continue to grow as the forms and volume of discoverable information increase at an extraordinary rate from year to year.

The most burdensome discovery obligations often rest with large corporations involved in significant corporate disputes. Despite the fact that this issue is well recognised and significant steps have been taken by lawmakers and judicial officers to attempt to limit discovery obligations appropriately, it is still not uncommon for large corporations to have to sort through millions (and, in some cases, tens of millions) of documents in order to comply with discovery obligations. Despite the fact that such corporations may well

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[6] G Dal Pont *Riley Solicitors Manual* (June 2012) LexisNexis Australia (online edition), [23,055]- [23,065].

[7] Ibid, [23,055.5].

[8] See, for example, *Civil Procedure Act 2010* (Vic), s98(1)(c).

[9] Productivity Commission, *Issues paper – Access to justice arrangements* (2013), 21.

be sufficiently resourced to fund that exercise, it is nonetheless a threat to the efficient administration of justice in at least the following ways:

- the imposition of oppressive discovery obligations are sometimes used as a weapon in the course of major litigation against a large corporation – the sheer cost and administrative burden alone can be a very significant incentive to settle in circumstances where the merits of the case may not warrant it;
- the volume of documents that may be produced in the context of large litigation may overwhelm the receiving parties and result in significant (and often unnecessary) costs being incurred in reviewing discovered material; and
- complying with a significant discovery obligation can take a lot of time and therefore result in delays in the administration of justice – the undesirability of which was highlighted by the High Court's judgment in *Aon Risk Services Australia Ltd v Australian National University*[10].

A detailed analysis of these issues and the ways in which they might be addressed is beyond the scope of this submission. We have, however, focussed on three potential areas for further reform below in response to the Commission's question as to how the rules of discovery could be reformed to improve access to justice.

Revisiting the scope of discovery obligations

(a) Standard discovery v discovery by categories

In our view, the scope of the test for standard discovery (such as exists in the Federal Court, for example) is generally appropriate. The test strikes an appropriate balance between, on the one hand, the need for a functional and transparent system of disclosure and, on the other hand, the need to avoid imposing unrealistic expectations and disproportionate costs on commercial parties.

Discovery by category (such as is required in the NSW Supreme Court, for example) may be appropriate in some cases, but more care and attention should be given to the drafting and scope of categories to ensure that they simplify (and appropriately limit) the discovery process. In our opinion, discovery by category must be underpinned by a threshold requirement of relevance – otherwise there is a very substantial risk (as we have observed in practice) that orders can be made that require the discovery of documents that are responsive to categories, but that are not relevant to the dispute. That is, in our experience, the limiting function intended to be achieved by categories can backfire and actually increase the scope of discovery.

Further, time spent by the court in interrogating and settling categories before the discovery process begins would substantially reduce the complexity, uncertainty and costs associated with providing documents. Where categories are appropriately drawn, they can limit discovery and reduce arguments later in the proceeding as to whether a particular type of document is 'relevant'. Categories should be couched, as far as possible, in terms which would allow an objective determination of whether or not a document should be discovered.

Categories that address relevance should be used in conjunction with categories that address *where* to search (or *where not* to search). In our view, narrowing the search for documents, and therefore limiting the number of documents that must be reviewed for relevance, is most likely to reduce the costs of discovery. Categories of documents that need not be discovered, or 'negative categories', often limit the scope of a search more effectively than positive categories and should be used where appropriate. For example, the court might order that a party give general discovery of all relevant documents except those held by third-party service providers and to which the party has an enforceable right of possession (as discussed further below).

[10] (2009) 239 CLR 175.

Tiered discovery orders should also be used where appropriate. For example, the general test might be applied to certain sources of documents (such as hard-copy correspondence and file notes), while other sources (such as emails, which are usually more numerous but are more suited to electronic searching) might be subject to a narrower category-based test.

(b) The scope of the search

In recognition of the need to reassess the scope of discovery obligation in the face of overwhelming data, the existing obligations might be further narrowed by limiting the obligation to documents currently in a party's possession or custody, unless there is some reason to believe or suspect that a party is 'warehousing' relevant documents. That is, there should be a rebuttable presumption that parties need not discover documents:

- currently in their power (but not in their custody or possession); or
- once but no longer in their possession, custody or power.

The obligation to discover documents that were once but are no longer in a party's possession, custody or power imposes a significant administrative burden on parties and is adhered to inconsistently in practice. It is also unnecessary in circumstances where the Court may impose a variety of sanctions on parties who deliberately fail to preserve documents that are relevant to the proceeding.

An alternative approach might be to modify the obligation to conduct a 'reasonable search' or make 'reasonable inquiries' so that parties need not take positive steps to search for relevant documents that were once but are no longer in their possession or custody. Parties would still be required to discover relevant documents, no longer in their possession or custody, of which they are already aware: this approach would affect only the obligation to *search for and identify* relevant documents.

In any event, we consider that the obligation to conduct a 'reasonable search' or make 'reasonable inquiries' could be further clarified. This could be achieved by publishing a set of non-binding practical steps or 'best practice' guidelines that, if followed by a party, will be deemed to constitute a reasonable search or inquiry. Practical steps could include, for example, preparation of a scope and search plan and key word searches of relevant employees' emails and other electronic databases.

Further, there should be a rebuttable presumption that a party need not search certain sources of possibly discoverable documents. Those sources might include, for example, back-up tapes, meta-data and electronic drafts. An opposing party who seeks to expand a search beyond the presumption should be required to demonstrate that it is proportionate and in the interests of justice to do so. Further, that party should be required to pay any additional costs, relevant to the additional required search or searches, at the outset, pending a final costs order.

Limiting discovery to 'documents that have significant probative value' or 'key documents' is unlikely to be productive, because these criteria are highly subjective and parties would still be required to conduct a full-scale document review to identify all of the 'key documents'. In our view, the burden of discovery would be more effectively and appropriately ameliorated by focusing on the scope of the search rather than the test for relevance.

The use of technology

We have addressed the 'use of technology' generally in the section starting at page 11 below. The comments in this section specifically address the use of technology in the context of discovery.

The use of electronic communications, tools and related technology in modern business has meant that an enormous number of documents and communications are created, sent and stored electronically, in many different formats. Accordingly, the discovery of electronic documents, and the problems and challenges that it raises, are key issues in any analysis of discovery practice and procedure. Even small and fairly focused disputes can raise issues requiring the examination of large numbers of electronic

documents to identify relevant communications or documents. In light of this, and the fact that most relevant materials are stored and managed electronically by parties, for discovery processes to be effective and cost efficient, it is essential that technology be used to manage those processes.

Experience has shown that, in the early stages of a matter, choices are made by parties regarding the method of collection, culling and processing of potentially relevant documents and information. For these processes to be efficient and not wasteful it is important that early agreement be reached, or a baseline standard be set, regarding acceptable methods by which electronic documents will be searched, collected, culled, reviewed and provided to other parties and the court. Specifically, parties should, to the extent possible, confer and reach agreement on areas including:

- scope of discovery and what constitutes a reasonable search of electronic documents;
- a strategy for the identification, collection, processing, analysis and review of electronic documents;
- the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data);
- a timetable and estimated costs for discovery of electronic documents; and
- an appropriate document management protocol.

Decisions in relation to each of these aspects can have significant cost implications, so an early assessment of these areas and negotiation and agreement between the parties is important. We consider that the 'Technology' Practice Notes in the Federal Court and NSW Supreme Court (for example) provide a useful framework for such negotiation and agreement. However, in our view, they are not sufficient in their own right. Among other things, greater judicial intervention in the process is required.

A further innovation that we consider could provide significant potential cost savings to the parties would be to create rebuttable presumptions that certain categories of documents need not be searched or produced in the absence of a demonstrated need. As noted above, obvious examples in the context of technology are backup tapes, metadata, and drafts of electronic documents. Such presumptions ought to:

- reduce the expense of discovery by eliminating any need to search these categories of documents (the search of which can be expensive and time consuming) absent a demonstrated need;
- provide parties with a clear understanding of what is not being searched;
- place the burden on the party seeking discovery to justify searches of categories of documents which are often voluminous, expensive to search, and not necessarily of significant probative value; and
- provide a framework which may increase the prospect of the parties successfully negotiating discovery orders, by making clear to each what their alternatives to a negotiated outcome are likely to be.

Greater scope for involvement by judicial officers

Judicial officers have shown an increasing desire to become involved in the appropriate management of the discovery burden. Such desires have been driving force behind the new process for discovery in the Equity Division of the NSW Supreme Court. They have also resulted in a number of Federal Court judges actively managing the discovery processes in certain cases in their dockets.

New rules have also been implemented in some jurisdictions that, for example, require the court to be satisfied that discovery is necessary before ordering it and to allow greater judicial case management of the discovery process.

In our submission there is, however, still scope for greater involvement by judicial officers in the discovery process. Ideally, judges would have sufficient time and technical expertise to manage the discovery process closely. A judge, fully apprised of all the issues in the proceeding, is in our view best placed to resolve discovery issues. Ideally, judges would routinely be involved in delving into cases in sufficient detail at any early stage to ensure that the discovery process is necessary, not abused and is being scoped appropriately having regard to the nature and scope of the case.

In that regard, we note the observation made by Justice Vickery (of the Victorian Supreme Court) in his article entitled *'Managing the paper: Taming the Leviathan'*[11] that discovery 'is not only amenable to case management, but arguably cannot function effectively without it'. In that context, his Honour goes on to repeat the following comment made by Justice Finkelstein (formerly of the Federal Court) in a 2008 ALRC paper[12] prepared in respect of discovery reform:

> The key to discovery reform lies in active and aggressive judicial case management of the process. The most effective cure for spiralling costs and voluminous productions of documents is increased judicial willingness to just say no.[13]

With respect, we strongly endorse those sentiments. Those sentiments were also echoed in the ALRC's Summary Report on Discovery of Documents in Federal Court (March 2011) which noted that 'robust judicial case management is critical in facilitating the resolution of disputes in the Court'.

However, financial and other constraints mean that judges, through no fault of their own, often have insufficient time and awareness of the practicalities of discovery to make timely, informed and detailed directions and to supervise the minutiae of the process. In those circumstances, the 'next best' option may be to introduce a panel of special officers (such as, for example, special masters) to manage the discovery process, subject to the following provisos:

- First, there should be a clear and automatic right of appeal to a judge from any decision of the special masters.
- Second, sufficient resources should be allocated to ensure that special masters have the necessary practical expertise and are able to resolve disputes quickly. Otherwise, this reform would merely result in an additional procedural step in the civil justice process.
- Third, as is the case in the United States, parties should be able to apply to have a judge deal with discovery issues at first instance, instead of a special master. Special masters may not be appropriate in all cases.

In our experience, the 'practice court' model in the Victorian Supreme Court has generally worked well. The practice court hears and determines interlocutory applications not within the jurisdiction of an Associate Justice and urgent applications.

Witnesses and experts

The law concerning what is properly the subject of expert evidence is complicated. This often makes it difficult to decide what are the correct questions to put to an expert. This fundamental practical problem is compounded by the difficulty of finding appropriate experts and determining whether candidates are properly qualified to answer the correct questions. Differences in the types of experts briefed or the ways in which they are briefed can in turn lead to difficulties at trial, especially where a judge is asked to resolve differences between experts who have not joined issue with each other directly.

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[11] Peter Vickery, 'Managing the paper: taming the Leviathan' (2012) 22(2) *Journal of Judicial Administration* 51.

[12] Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts Report No 115* (March 2011) http://www.alrc.gov.au/sites/default/files/pdfs/publications/Whole%20ALRC%20115%20%2012%20APRIL-3.pdf, 14.

[13] Vickery above n 10, 68.

From such difficulties flow increased effort and therefore increased cost. Various practices have been adopted with a view to addressing them.For example, the court can direct expert witnesses to confer and/or to prepare a joint report[14]and to give evidence concurrently.[15] In our submission, none of these practices solves the essential problems outlined above. This is not only or even principally because of inherent flaws in those practices. It is because problems of expert evidence arise in ways that are peculiar to the character of each case. For that reason, it is submitted that the best approach is the one that is the most flexible and the least prescriptive: the requirement that no expert evidence be adduced without leave.For example, r31.19 *Uniform Civil Procedure Rules 2005* (NSW) (***UCPR***) requires any party intending to adduce expert evidence to seek directions from the court first and r427 *Uniform Civil Procedure Rules 1999* (Qld) which provides that an expert report can be tendered as evidence only with leave).

Case management

The Commission has identified two basic approaches to the allocation of cases in Australian courts – the 'individual list model' (also known as the docket system) and the 'master list model'. Among other things, it has asked how effective they have been in reducing cost and delay.

We are not aware of any empirical evidence as to one approach being more efficient than the other. Anecdotally, based primarily on our experience in the Federal Courts and NSW and Victorian Supreme Courts, both approaches have their advantages and disadvantages and neither is necessarily superior to the other in a general sense. In circumstances in which we assume a docket system is more expensive to administer (due to the additional judicial resources required), questions might be raised as to whether those additional costs are contributing to the efficient administration of justice.

There is no doubt that the docket system is capable of delivering superior case management outcomes. This generally, however, requires judges to spend significant time engaging with the parties and the issues at an early stage in a way that is rarely practical having regard to the number of cases each judge has in their docket.

One trend we have observed is the increasing tendency in the context of a docket system for individual judges to develop their own set of rules or practices in relation the management of the cases in their list. Whilst we understand these rules or practices are generally developed with a view to improving efficiency, the practice can have a number of unintended consequences. Perhaps most importantly, it introduces an additional element of uncertainty and unpredictability into the litigation process which is often to the disadvantage of the litigants involved. This is because, among other things, it makes it difficult for practitioners to provide meaningful estimates of the costs involved in running certain stages of the litigation and to plan effectively for the conduct of the case. These complications are compounded when the docket-specific rules are applied inconsistently.

Cost awards and court fees

What factors should be considered in determining court fees? How can processes for determining fee structures be developed to improve the incentives for disputants?

Fee waivers should be available to all financially disadvantaged litigants. The fact that the litigant may be represented by a lawyer or barrister acting on a pro bono basis should not affect the litigant's opportunity to obtain fee waivers. Pro bono lawyers often do not have the means to pay disbursements for their clients and the need to do so reduces the profession's capacity to provide pro bono legal services.

[14] *Uniform Civil Procedure Rules 2005* (NSW), r31.24.

[15] *Uniform Civil Procedure Rules 2005* (NSW), r31.35.

The use of technology

What opportunities are there to use technology to cost-effectively expand services particularly for regional and remote Australia?

Changes in technology that affect access to justice are primarily to do with:

- access to information; and
- delivery of legal services.

These changes are altering how cases are prepared and court hearings are conducted. A challenge for litigants in case preparation is efficiently locating relevant evidence given the vast volumes of electronic data being produced. According to IBM who have coined the phrase "big data", "*90% of the data in the world today has been created in the last two years alone"*.[16] Big data has had a significant effect on the cost of litigation. However, newer searching and data analytics technologies have significantly improved efficiencies in finding evidence. As technology continues to develop, it can be used as an enabler to provide better access to justice in some areas which include the following.

Providing access to information

Access to justice begins with the parties being able to find the relevant information and expertise about options available to them to resolve disputes.

Over the last decade there has been considerable advancement in the availability and quality of information on legal processes and procedure. Examples include court websites which now include forms, instructions, costs, practice notes, etc. As well, websites such as Austlii make case law and statutes easily accessible which is an invaluable free resource that can be accessed by anyone anywhere.

There is opportunity for this type of online information to continue to grow and evolve. While unofficial sources of information can be useful, information that is authoritative as well as accessible should be maintained by government agencies and departments. For example, initiatives like the Attorney-General's Access to Justice website acts as a starting point to providing relevant information to anyone seeking it or options for preventing disputes or for resolving disputes quickly and easily.[17]

Finally, the technology currently being rolled out by NBN to enable faster connectivity will have a positive impact on the access to information and delivery of legal services, especially in remote communities. The NBN technology will also enable more use of online video/audio. For example, the High Court has recently announced it will begin making audio-visual recordings of its hearings available on their website from October.[18]

Use of technology by courts and tribunals

Use of technology in courts and tribunals is on the rise. Electronic case management and court systems can improve timeliness and effectiveness by providing:

- a more efficient means to lodge court documents electronically and access the court record including case listings and orders. Such systems include the Commonwealth Courts Portal and the Federal Court's eLodgement system;
- improved efficiencies in pre-trial proceedings using facilities such as the Federal Court's eCourtroom facilities for carrying out directions, submissions and other orders. Current systems

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[16] IBM, *Bringing big data to the Enterprise* (2013) <http://www-01.ibm.com/software/au/data/bigdata/>.

[17] Attorney-General's Department, *Harnessing the benefits of technology to improve access to justice* (November 2012) <http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/harnessing_the_power_of_technology_analysis_paper.pdf>.

[18] High Court of Australia (Media release, 2013) <http://www.hcourt.gov.au/assets/news/MR-audio-visual-recordings-Oct13.pdf>.

use chat room style technology and it would be advantageous to implement video conferencing facilities for improved remote interaction;

- improved efficiencies for running a matter in court using electronic court technologies with the latest audio, video transcript and evidence presentation systems. Anecdotal evidence suggests use of an electronic court reduces hearing time 25-30%; thus reducing the overall court costs significantly for parties. Remote access to such systems is an additional benefit which provides online facilities to monitor the hearing remotely; and
- video conferencing for witnesses in court or for use in alternative dispute resolution which can significantly enhance access to justice, especially for remote communities and citizens overseas. Access to reliable video conferencing technology will continue to improve with the NBN rollout and improving web based videoconferencing and VoIP (Voice over Internet Protocol).

The cost of electronic court systems has decreased significantly in the past 5 years; however, there are still significant infrastructure costs to set up electronic courts. We believe there is significant benefit to litigant's access to justice when courts have invested in the necessary infrastructure.

Use of technologies in case preparation

To comply with legal obligations and reduce costs of a dispute involving a legal review of large volumes of documents, technology may:

- reduce the number of documents required to be reviewed by lawyers; and
- improve review speeds and utilise resources efficiently.

In Australia, database technology is commonly used to search and review documents for case preparation in medium to large legal disputes. Given the proliferation of electronic information, document volumes can be large, even if the quantum of the dispute is small. Court Practice Notes encourage the use of such technology for document volumes typically over 200.

Various technologies commonly used to reduce document volumes include:

- automatically removing exact duplicates;
- keyword searching to exclude irrelevant documents; and
- data range exclusion.

Early Case Assessment (ECA) is a growing technology market which includes data analytics technologies such as grouping documents by concepts and predictive coding. Predictive coding is a newer technology which is starting to gain momentum internationally, and particularly in the US, to limit document volumes. These technologies assists in identifying key evidence which is useful given the move by some courts such as the Equity Division of the NSW Supreme Court (see "Practice Note SC Eq 11 Disclosure in the Equity Division") and the Federal Court (see "Practice Note CM 6 Electronic technology in litigation") towards electronic discovery. As well, these technologies are being used to assist in prioritising sets of documents for review, making document review faster and more efficient.

The costs of these technologies are not insignificant; however, disputes involving large volumes of documents would be prohibitively expensive without them. These technologies and expertise to use them effectively are readily available from a range of suppliers both within the Australian market and internationally.

Courts should continue to encourage use of technology by parties for improved efficiencies and should continue to promote initiatives through Practice Notes such as:

- consistency across jurisdictions for electronic production standards to minimise costs of compliance; and
- direction for parties to agree protocols for exchanging documents electronically.

Topic 12 – Effective and responsive legal services

Billing practices

What evidence is there of the uptake of alternative fee arrangements in Australia? Are there any barriers (legal or practical) to their uptake? Has the use of alternative fee arrangements altered the costs to both lawyers and consumers?

What restrictions should apply to billing arrangements, and what cost disclosure rules should apply? Which billing practices more frequently result in client complaints or dissatisfaction, and how much of this relates to poor communication of costs?

We have seen gradual growth in the use of alternative fee arrangements (***AFAs***) in our practice. These AFAs include the following.

- Variations on the billable hour - such as volume based discounts and blended hourly rates.
- Fixed fees
- Capped feeds
- Gain share / Pain share
- Retainers
- Portfolio pricing

In our experience, combinations of these fee structures are now common in all areas of non litigious, corporate legal work. While billing by reference to hourly rates and careful budgeting remains the dominant fee structure in relation to litigious matters, we have recently seen increased interest from clients in the possible use of permissible AFAs in litigation matters.[19]

Annual surveys of the corporate legal services market[20] by Jasper Consulting show that while the billable hour remains dominant, growth in the use of AFAs is now a feature of that market. The proportion of respondents to the Jasper survey who report using hourly billing for 90% or more of their legal spending has fallen from 77% in 2010 to 59% in 2013, though the rate of change more recently appears to have slowed.

Percentage hourly rate billing	2010	2011	2012	2013
90% or more	77%	54%	61%	59%
67-89%	13%	30%	28%	31%
50-66%	10%	15%	8%	10%
Less than 50%	Zero	1%	3%	0%

Source: Jasper Consulting, Proprietary Research 2013, republished by consent.

In our experience, clients' motivations for using of AFAs vary. Generally, we have found that clients are interested in AFAs for one or more of the following reasons:

[19] We discuss the reasons why the prohibition on lawyers charging contingency fees in Australia should remain in place below, in relation to topic 13.

20 ASX top 100 organisations, together with leading investment banks, and large federal and state (New South Wales, Victoria and Queensland) government departments.

- the client wishes to share the risk of an unsuccessful transaction with the law firm (e.g. 'Pain Share / Gain Share');
- the client desires greater certainty regarding total costs (e.g. Fixed Fees, Capped Fees, Event Based Fees, Retainers);
- the client wants to drive greater efficiency (e.g. Fixed Fees, Performance Bonuses); and
- more recently, 'head office' policies mandating the increased use of AFAs by Australian subsidiaries.

All of these arrangements involve the transfer of one or more types of risk to the legal service provider. For example, Pain Share / Gain Share arrangements put part of the legal service provider's agreed fees at risk if the transaction is not successful. Fixed and Capped Fee arrangements transfer the risk of underestimating the work involved in the matter to the legal service provider. While some risks are at least partially within the control of the legal service provider and therefore appropriately borne by the legal service provider, strong competition and unequal bargaining power routinely drives providers to take on risk that is not within their control (e.g. the risk that a transaction will not complete).

There are additional transaction costs associated with planning, agreeing and then providing legal services under AFAs. For example, considerable resources must be expended by the law firm scoping work and defining assumptions in order to be able to properly manage the risk associated with proposing a fixed fee to a client where there is uncertainty associated with the work that will ultimately be required to be completed in the matter. On the client side, considerable work is required to assess the fixed fee and whether it is reasonable having regard to the work to be performed and the associated assumptions. In contrast, hourly rates can be quickly benchmarked, and little investment of time is required up front before work can commence.

Consistent with hourly billing being the dominant fee structure in use today, our experience is that this model has traditionally attracted the most criticism from clients. Our experience is that issues generally arise from:

- the actual cost of the work exceeding estimates provided, notwithstanding good faith diligence having been exercised in developing the estimate; or
- ineffective communication concerning events that take place after the estimate has been provided, but which result in unexpected cost over-runs.

Issues such as these are driving fresh investments by legal service providers in improving legal project management skills and providing lawyers with the tools (including IT systems) that they need to more effectively manage costs.

Pro bono

How important is pro bono work in facilitating access to justice?

Allens is strongly of the view that pro bono legal work is not a substitution for adequate publicly funded, high quality legal service for those who cannot afford legal representation. However, pro bono representation is an important, albeit limited, element of the legal services available to those who cannot retain private legal service providers. Although legal aid can provide skilled advice and representation to those who cannot pay for legal service providers and particularly in Victoria, is increasingly doing so to run test case litigation, the fact that legal aid has a statutory mandate to provide certain types of services limits its capacity to undertake advocacy work. Similarly, community legal centres also face some constraints on independence, (as evidenced by the recent removal of funding for environmental defenders' offices) and experience chronic resource shortages. The private profession is uniquely placed to undertake public interest litigation.

However, whether public interest test case initiation or high volume poverty law work, the nature of pro bono work makes it an unreliable and limited resource. Legal service providers take on the pro bono matters that suit them, when it suits them to do so. The volume of pro bono work they do ebbs and flows according to their paying workload, their inclination, the success of their most recent matter, their sense of the priority areas and the availability of relevant training and referrals. Pro Bono work is not systematic. The nature of pro bono practices varies from firm to firm and barrister to barrister. A high proportion of pro bono work is done, according to the National Pro Bono Resource Centre's reports, for not for profit organisations, rather than for individuals. Work for individuals is often done through on the spot advice clinics and does not always include ongoing file work. The decisions made by legal service providers about what work to take on will include consideration of partners' and staff's interests, perhaps commercial clients' priorities and short term trends. Accordingly, pro bono work cannot be relied on as a predictable element of access to justice.

It is important to note that much of the pro bono work undertaken, particularly the work for individuals, is dependent on community legal centres for its success. The collaborations between many private law firms and community legal centres provide the structures for projects such as the various homeless legal clinics, mental health advocacy work projects, credit and debt clinics, refugee legal clinics and other projects. Law firms and barristers are not often well placed to identity legal need and appropriate clients. The areas of law in which disadvantaged individuals need assistance are not often the areas of law in which the large private law firms (the biggest providers of pro bono legal services) practise. Accordingly, the most successful pro bono projects involve the provision of training and support by community legal centres in relevant areas of law and often social factors relevant to working with particular groups to the private profession.

Referral agencies such as Justice Connect and QPILCH play a critical role in facilitating the provision of pro bono services. They are expert at identifying need, assessing clients' suitability for assistance and referring clients to pro bono providers. This greatly increases the efficiency of pro bono practices, which do not then have to canvass the community directly themselves but can rely on referral agencies, together with collaborations with community legal centres for much of the pro bono work they do.

How successful has the National Pro Bono Aspirational Target been in encouraging pro bono work?

Some respondents to the National Pro Bono Resource Centre's surveys report it is important. For Allens, the existence of the target has motivated us to formalise a higher internal target. Limitations of the target include the fact that the Centre does nothing to mandate compliance and to strike off signatories for non compliance. Secondly, there is no distinction between work for disadvantaged individuals and work for not for profit organisations, regardless of the nature of the organisation. It is possible to fulfil the target by doing only work for arts, sporting or religious organisations.

What are the costs and benefits that accrue to legal service providers who provide pro bono services?

The costs include out of pocket expenses meeting disbursements for clients who cannot fund their own court fees, expert reports, interpreter fees and so on, as well as significant out of pocket expenses for travel to meetings, court and remote locations to meet with clients. In addition, although commercial work is not usually declined at private law firms to take on pro bono work, a demanding pro bono practice can mean partners and staff are required to work long hours and under considerable pressure to fulfil all their obligations.

The benefits are many and include the satisfaction that accrues to the individuals who have the opportunity to use their legal skills to benefit individuals and organisations that would not otherwise have access to legal services. Allens' partners and staff derive great satisfaction and valuable legal experience from much of our pro bono work, particularly from public interest litigation matters and from working in areas of law that are otherwise not part of our practice. The firm as a whole takes pride in the assistance we provide to many in our community through our pro bono practice and the fact that the practice has high value within the firm.

How well do pro bono programs operate, how are they resourced and are they effectively targeted?

Please see comments above about the limitations of pro bono. The quality, resourcing and targeting of pro bono practices vary greatly, just as the quality, resourcing and targeting of commercial practices vary.

What barriers are faced by lawyers seeking to provide pro bono services and how are they being addressed? To what extent are the responses to these barriers lined to the success of the national legal profession reform?

Please see the comments on fee waiver earlier. It is also important that there be clarification regarding the status of conditional costs agreements in pro bono matters. *King v King & Ors*[21] left some doubt about the circumstances in which costs will be awarded to a successful party who was the beneficiary of pro bono representation.

The Legal Profession Act in Western Australia requires any lawyer subject to supervised practice requirements to obtain specific approval from the Legal Practice Board to provide volunteer legal services under the supervision of the principal solicitor of a community legal centre. This requirement is more onerous than in other States and is time consuming and complex to fulfil. It makes the types of collaborative projects between private law firms and community legal centres that are a key part of the provision of pro bono services, difficult to conduct. It would be useful for the requirements of supervised practice with respect to volunteer legal work for community legal centres to be made uniform.

Topic 13 – Funding for litigation

Contingent billing and contingency fees

The Commission has posed the question of how the use of contingent billing has improved access to civil justice in Australia, and whether it can be improved. We are also asked to address why and what regulatory constraints should be used in relation to contingent billing. It therefore appears that, in the issues paper:

- the effectiveness of contingent billing in improving access to justice is assumed; and
- there is a risk that conditional fees and contingency fees are conflated as being forms of 'contingent billing', with the important differences between these different types of fees being overlooked.

In our submission, it is important to bear in mind the differences between these two types of fees, as contingency fees give rise to significant conflict of interest risks. We also consider that neither type of fee is likely to improve access to justice significantly.

Under topics 2 to 8 above we identify those areas in which we are aware of the greatest unmet legal need, primarily clients using homeless persons' legal clinics, people with mental illnesses, impecunious litigants, and remote Aboriginal and Torres Strait Islander communities. These clients' needs often relate to consumer, government and housing matters which are generally less likely to result in large awards of damages or compensation. They are therefore less likely to attract lawyers wiling to act on a conditional fee or contingency fee basis. Personal injury and money matters, which do result in larger awards of damages, are already generally handled with legal advice. In our submission, therefore, neither conditional fees nor contingency fees are likely to have a significant effect on access to justice in those areas of greatest unmet legal need.

The crucial distinction between conditional fees and contingency fees is that conditional fees are charged by reference to the work undertaken by the lawyer, and cannot be charged by reference to the value of the claim. In this way they are similar to traditional lawyers' fees. This is true even where a conditional fee agreement provides for the payment of an uplift fee: under existing laws, the uplift fee must not be

[21] [2012] QCA 81.

calculated by reference to the value of the claim. By contrast, contingency fees are charged as a percentage of any award or settlement, effectively giving the lawyer a purchased share in the litigation. It is this direct financial interest in the litigation, and not the fact that the fee is charged on a 'no win, no fee' basis, which gives rise to conflicts of interest. The Commission recognizes that State and Territory laws currently prohibit lawyers from entering into costs agreements that provide for the payment of contingency fees, on the basis that a conflict of interest may arise, for example, where a lawyer:

- encourages vulnerable plaintiffs to agree to an inappropriate contingency fee, for example, a contingency fee which does not reflect the work required in resolving their claim or degree of risk of the claim being unsuccessful;
- adopts an inappropriate position or strategy in anticipation of a large award of damages and, consequently, a large fee, even where a client would have been satisfied with, for example, a non-monetary resolution to the dispute, such as an apology;
- encourages an unreasonably high contingency fee or fails to inform a client that a certain contingency fee is not in their financial interest;
- seeks to settle a claim prematurely in order to capture the greatest fee for the least amount of work;
- abandons viable causes of action due to an unwillingness to increase legal costs; or
- seeks to pursue high cost claims to the point where it is no longer commercial for the defendant to continue and thereby forces settlement without merit.

These conflicts of interest may impede a prospective litigant's access to justice and undermine public confidence in the administration of justice more generally.

Relevant to this topic, and topic 13 (discussed below), a number of recent decisions[22], and in particular the High Court's decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*[23] (***Fostif***), make it clear that the courts are willing to accept third party, non-lawyer litigation funding on the basis that it may improve access to justice. However, as noted by the minority in *Fostif,* it is important to ensure that solicitors remain independent if the risks associated with third party funding (discussed further below) are to be managed appropriately. Removing the prohibition on lawyers charging contingency fees would therefore threaten the basis on which the High Court has been willing to accept that third party funding does not represent an abuse of process.

Defeating the purpose of compensatory damages

Contingency fees, unlike conditional fees, erode awards of compensatory damages. In Australia, damages are awarded by reference to the loss suffered by the plaintiff, with a view to 'making the plaintiff whole'. Allowing lawyers to charge a percentage of any award or settlement leaves plaintiffs without compensation for the whole of their recoverable loss. This possibility is particularly acute in most personal injury matters, where damages are capped by State and Territory legislation, limiting recovery.[24]

In the United States, where damages are often determined by juries and punitive damages are frequently awarded, this is less of an issue. There are additional amounts from which lawyers' fees can be drawn without eroding compensatory damages. Further, contingency fees are capped or otherwise restricted in many United States jurisdictions — particularly in personal injuries matters. In the United Kingdom, not only are contingency fees capped, they also cannot be charged on a plaintiff's damages for future care

[22] See *Clairs Keeley (a firm) v Treacy & Ors* [2005] WASCA 86; *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455.

[23] (2006) 229 ALR 58.

[24] See, for example, *Wrongs Act 1958* (Vic), Part VB.

and loss. In addition, it is notable that when the United Kingdom introduced contingency fees, it increased awards of general damages for non-pecuniary loss such as pain, suffering and loss of amenity by 10%.

The need for regulatory constraints

The Commission also questioned what regulatory constraints should be imposed in relation to contingent billing and why. We submit that current regulation of conditional fees should remain, and contingency fees should continue to be prohibited. If, notwithstanding our primary view, contingency fees are to be permitted, further consideration should be given to the matters set out below.

(a) Contingency fees should remain prohibited in relation to certain types of litigation, such as criminal and family law matters.

(b) The danger that contingency fees will erode awards of compensatory damages is particularly acute in the absence of any cap or limit on the percentage figure that could be agreed between a lawyer and a client. Legislated caps should therefore be considered.

(c) In considering how percentage-based contingency fees should be regulated, we would recommend that the Commission also consider:

  (i) how the regulation of contingency fees would interact with the regulation of conditional fees, and the regulation of professional ethics and costs more generally (for instance, what disclosure obligations should apply, and whether clients should be required to obtain independent advice);

  (ii) how different contingency fee agreements in the same matter would interact with each other (for instance, separate contingency fee agreements entered into by solicitors and barristers);

  (iii) how the regulation of contingency fees would interact with the regulation of financial services (for instance, whether law firms would be required to hold Australian Financial Services Licences, or register as managed investment schemes, or maintain minimum capital reserves); and

  (iv) how contingency fee agreements will interact with applications for security for costs (in particular, whether a lawyer acting under a contingency fee agreement should be required to contribute to security for costs if so ordered, on the basis that, if successful, the lawyer will share in the damages awarded).

(d) How contingency fee agreements would operate in representative proceedings would also need to be considered. Contingency fee agreements are available in class action proceedings in both Canada and the United States, but present a number of complex issues when applied in this context.

Class Actions

How effective are class action procedures in providing access to justice?

In our submission, the potential for class actions to improve access to justice is limited, for at least two reasons. Class actions may improve access to justice where:

- a large number of claimants have monetary claims against the same defendant,
- where the claims concern or arise out of a singular common problem, such as a catastrophic event or standard form contract alleged to be unfair.

As discussed in relation to conditional fees and contingency fees above, however, such claims are unlikely to arise in the areas in which we are aware of the greatest unmet legal need. Further, under the rules governing the conduct of class actions as presently interpreted, it is possible to commence and pursue a class action where any question common to all members of the class can be identified. This is

so regardless of whether the issue addressed by the common question is relatively minor in the context of the broader dispute between the claimants and the defendant(s), and regardless of whether the questions that remain to be resolved turn on matters not common to the class members. In such circumstances a class action is likely to hinder, rather than promote, access to justice, as it simply creates an unnecessarily complicated proceeding in addition to the necessary individual proceedings.[25] We therefore submit that, amongst other possible reforms, to enhance access to justice, it should be requirement that in order to proceed with a class action that the common questions for the class predominate over questions affecting only individual class members.

Finally, litigation funders impose constraints on the types of class actions that are brought. For example, IMF (Australia) Ltd will reject all claims that are less than $2 million in the aggregate.[26] IMF also rejects cases that involve significant amounts of oral evidence.[27]

How effective are general disclosure requirements, such as for cost estimates in the context of class actions?

There are two key types of disclosure obligations in class actions. These are disclosure obligations that the representative member's lawyers owe to class members and the disclosure obligations that litigation funders owe to class members. The disclosure obligations that the representative member's lawyers owe to class members are the same as those between any lawyer and client. These obligations are set out by legislation, such as the *Legal Profession Act 2004* (Vic). This legislation appears to govern the area effectively. An area of greater concern is the disclosure requirements between litigation funders and class members.

Until recently there has been no regulation of class action disclosure obligations. In July last year, the Federal Government introduced the *Corporations Amendment Regulation 2012 (no 6)*. This regulation states that litigation funders are effectively exempted from the requirement to hold an Australian Financial Services Licence under Ch 7 of the *Corporations Act 2001* (Cth), provided they:

- maintain adequate practices to manage conflicts of interest in respect of financial services relating to class actions and other group proceedings; and
- develop and implement specified written procedures for identifying and managing conflicts of interest (the ***Conflicts Requirements***).

What constitutes adequate practices to manage conflicts is set out in guidance provided by ASIC in April this year. That guidance is entitled Regulatory Guide 248: *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (the ***ASIC Guide***).

While the ASIC Guide is a step in the right direction, there are several shortfalls with the guidance. First, while failure to comply with the Conflicts Requirements is an offence, the ASIC Guide does not have the force of law. This means that a breach of the ASIC Guide does not automatically amount to a breach of the Conflicts Requirements. Consequently the effectiveness of the ASIC Guide largely depends on what approach ASIC takes to enforcing the guide. Since the ASIC Guide was only introduced in April this year, it is unclear what approach ASIC will take. Given the former Federal Government's light touch approach to litigation funding regulation, it may be that ASIC similarly takes a hands off approach.

The second shortfall is that the ASIC Guide only addresses disclosures of conflicts, as opposed to other disclosures. The ASIC Guide does not require disclosure of costs estimates to class members and disclosure of funding agreements to the court. If litigation funders were required to disclose funding agreements to the court, then the court could review those agreements before allowing the matter to progress. An independent review of funding agreements by the courts would improve the transparency of

[25] As was arguably the case in the VIOXX litigation: *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128.
[26] Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia,* (Thomson Lawbook Co., 2nd ed 2012), 830.
[27] Ibid.

the funding agreements and protection of class member interests. For these reasons we recommend such disclosure in relation to litigation funding, generally, below.

Litigation Funding

What risks are posed by litigation funding arrangements and how do these differ from the risks posed by contingent and other billing practices?

In broad terms, litigation funding arrangements pose the following two risks

(a) Conflicts of interest between the plaintiffs and the funder.[28]

Examples of possible conflicts of interest include the quantum of contingency fees charged (a litigation funder's contingency fee is usually between 25 and 40%[29]) and deciding whether to settle a class action and the terms of settlement. Group members may wish to settle the proceeding for an amount less than the funder considers suitable.[30]

The risks of lawyers being permitted to charge contingency fees are discussed above. Similar risks may also arise if lawyers have a direct or indirect interest in a commercial litigation funder. These issues are presently being considered in the context of the relationship between senior lawyers at plaintiff law firm Maurice Blackburn and the third party litigation funder Claims Funding Australia.[31]

(b) Adverse costs orders being unenforceable against litigation funders

This problem will arise if a funder has insufficient resources to meet an adverse costs order. Litigation funders that are based offshore could raise jurisdictional barriers to avoid their financial obligations. In either case, the costs indemnity rule will be subverted.

What proportionate and targeted regulatory responses are required to manage these risks, and is more uniform regulation required across jurisdictions on this matter?

More regulation is required to manage the risks identified above, and should be uniform across Australian jurisdictions. We submit that the following regulatory responses should be adopted.

- All litigation funding agreements should be in a standard form, mandated by legislation, including a cap on fees. The fees charged by litigation funders may be as large as 40% in some class actions. These contingency fees appear to be excessive given that funders undertake a rigorous risk analysis process before approving a case for funding and the success rate for class actions is very high. For example, according to its 2012 Annual Report IMF has only lost 5 out of 137 cases.
- Such funding agreements should also be filed with the court at the commencement of proceedings, with an obligation on the court to review those agreements before allowing the matter to progress. While the legislation should set out particular requirements, those requirements can never be exhaustive. Accordingly, the court must be in a position to determine ultimately whether a particular litigation funding agreement is acceptable. As all parties to a proceeding have an interest in the proper administration of justice, litigation funding agreements should also be served on the other party or parties to the litigation.
- All litigation funders should be subject to prudential regulation. If there is some doubt as to the solvency of a litigation funder, it should be open to the other party to pursue a security for costs

[28] The potential for conflicts may be aggravated by funders such as IMF (Australia) Ltd and Hillcrest Litigation Lending Services Limited being listed on the ASX.
[29] Law Council of Australia, *Position Paper* (2011) <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/RegulationofthirdpartylitigationfundinginAustralia.pdf>.
[30] Vince Morabito and Vicki Waye, 'Reining in Litigation Entrepreneurs: A New Zealand Proposal' (2011) 2 *New Zealand Law Review* 323.
[31] Alex Boxsell, 'Judge probes lawyers' horse flu damages case', *Australian Financial Review*, July 26 2013, 32.

application against the funder. In the exercise of the court's discretion, such applications may warrant consideration of different matters than those considered in the context of more conventional security for costs applications.

- Funders should be subject to mandatory minimum disclosure requirements covering all arrangements between the funder and the solicitors as well as all financial risk and other obligations, including potential risks and obligations, imposed on the plaintiff.

Allens
22 November 2013